

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5775 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

S M PATEL

Versus

GUJARAT RAJYA KHADI GRAM UDYOG BOARD

Appearance:

MR JR NANAVATI for Petitioner
MR AKIL KURESHI for Respondent No. 1
None present for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 11/12/96

ORAL JUDGEMENT

1. Heard learned counsel for the parties. Challenge is made by the petitioner to the order of the respondent no.1 dated 4th October, 1983, the seniority list of the petitioner and respondent no.2 in which the later was placed senior to the former. The petitioner has further challenged the order dated 7th October, 1983 under which the respondent no.2 was given promotion to the post of

Deputy Director (Technical).

2. There is no dispute that the petitioner entered in the Board services later in point of time than the respondent no.2, but in the higher pay-scale. There is also no dispute that the respondent no.2 came to be appointed as Junior clerk on 15-12-1959 whereas the petitioner was appointed on 1-12-1960. The post of Jr. clerk was the post of higher pay-scale than the post of Ambar Nirikshak. So in the cadre of Jr. clerk, the post of higher payscale, the entry of respondent no.2 is earlier to the petitioner. The next post of promotion was of Sr. clerk, where the respondent no.2 was promoted on 1-2-1963 whereas the petitioner was promoted to this post on 1st July, 1964. The petitioner at no point of time has challenged the orders of the Board under which the respondent no.2 was promoted earlier to him in the category of Jr. clerk and Sr. clerk. Now there is no dispute that on next two posts of promotion i.e. the Assistant Organiser and Technical Assistant, both the petitioner and respondent no.2 have been promoted on the same day i.e. 10th October, 1973 and 5th November, 1982. In the seniority list which has been published from time to time of the Assistant Organiser on 15-3-1973, 20-12-1973 and 30-09-1978, the petitioner has been shown senior to respondent no.2, but he was not satisfied with the assignment of the seniority to him below the petitioner and he made a representation. The representation of respondent no.2 has been accepted and consequential changes in the seniority inter-se of the petitioner and respondent no.2 has been made and the respondent no.2 has been placed senior to the petitioner which order is impugned in this Special Civil Application.

3. The learned counsel for the petitioner does not dispute that this order has been made after giving an opportunity of hearing to the petitioner. So far as the second order of challenge is concerned, it is an order of promotion of respondent no.2 and the counsel for the petitioner has also not put in issue that the promotion has to be made strictly on the basis of seniority meaning thereby in case the claim of the petitioner for seniority above the respondent no.2 is accepted then second order, consequential to the first will go automatically. The contention of the learned counsel for the petitioner is that the petitioner and the respondent no.2 have been promoted on the post of Assistant Organiser on the same day, the petitioner being older than respondent no.2 he has been given the seniority above him and that has been done in accordance with the Board's rules relating to

seniority. A translation copy of the rules have been provided by the counsel for the Board to the court which is agreed by the counsel for the petitioner. The counsel for the petitioner placed in service Rule 3(5) in support of his contention, which reads as under:

Rule-3(5)

At the time of initial entry in the Board on a post seniority shall be counted from the date of reporting on duty on such post. However, more than one servants/officers report for duty on the same post on the same date in which case seniority shall be decided according to date of birth, time of reporting.

4. On the other hand, the counsel for the Board contended that the aforesaid rule is not available to the petitioner as it relates to the determination of seniority at the time of initial entry in the Board's service. The case of the petitioner and the respondent no.2 is of promotion and as such, as per the contention of the counsel for the respondent, Rule-3(6) is the relevant rule. To appreciate the contentions made by the counsel for the parties, I consider it appropriate to reproduce the said rule also.

Rule-3(6)

In case of a promotee servant/officer report for duty on a post his seniority right shall ordinarily approve from the date from which he is officiating on the said post. In other words seniority shall be decided from the date of continuous officiation. For deciding this fortuitous period shall not be taken into account.

In Rule-3(5) there is a provision where more than one employee, servants/officers report for duty on the same post on the same day, in such case, the seniority shall be decided according to the date of birth at the time of reporting. In the case of promotion, as per rule of seniority, the seniority has to be determined with reference to the date from which the officer concerned is officiating on the post. In the case of promotion, though there is no specific provision regarding the determination of seniority of the two officers who have been promoted on the same post and joined on the same

day, but this court cannot read something in the Rule-3(6) which was not there or which was not intended by the rule making authority, but the counsel for the petitioner urged that in case of promotion also where both the officers promoted on same post and joined on same day, the seniority shall be reckoned according to the date of birth, but it cannot be permitted. The law interpretation of the rule is that the court cannot add or subtract from the rule. Rule framed by the rule making authority should be taken as such and given effect to unless there is some ambiguity or when the provisions contained therein are not clearly spelt out the intention, which is not the case here. I find sufficient justification in the contention of the counsel for the respondent that in case of promotion the seniority has to be decided, in the case of employees who have been promoted to the same post and joined on the same day, with reference to their seniority in the feeder cadre. In the case of promotion and more so where the criteria for promotion is seniority, the employees who have been promoted on the same post and joined on same day, should have the seniority which they were having in the feeder cadre. In the case where the criteria for promotion is merits or selection then this principle may not be acceptable, but that is not the case here and I am also not deciding this question as it is not in issue between the parties. Facing this difficulty, the counsel for the petitioner contended that in case, the seniority has to be taken at the entry of service and as the petitioner though entered in the service earlier to respondent no.2, but the later was appointed in higher payscale, and as such, he should be taken senior to him. In this case that contention is not available to the counsel for the petitioner.

5. The petitioner was admittedly appointed in the category of the post of same payscale i.e. Jr.clerk later in time than the respondent no.2. In the next higher post i.e. the Sr. clerk, the petitioner was given the promotion after the respondent no.2. As stated earlier, the petitioner has not challenged the appointment of respondent no.2 earlier to him on the post of Jr. clerk as well as his promotion earlier to him on the post of Sr. clerk. The seniority has to be taken with reference to the date of appointment on the post of same payscale and that is only reasonable and proper course in the present case. The grievance of the respondent no.2 made against the assignment of seniority to the petitioner above him in the cadre of Assistant Organiser was perfectly legal and justified and it has rightly been accepted by the Board. Sitting under

Article 226 of the Constitution of India, this court will decline to interfere with the order where it considers that no injustice has been done to the petitioner.

6. Taking into consideration the fact that initially also the respondent no.2 has entered in the service, may be on the post of lower payscale, about two years earlier to the petitioner and on the post of equal payscale as well as to the next higher post, much earlier than the petitioner, the assignment of seniority to respondent no.2 below the petitioner was certainly not justified. It is a case of promotion on the same post on which they joined on the same day, and as the petitioner was appointed as Jr. clerk and promoted to Sr. clerk later in time than respondent no.2, the petitioner's claim for seniority above that person is wholly unjustified. It is a case where in case any interference is made in the order impugned, then it may cause prejudice to respondent no.2.

7. In the result, this Special Civil Application fails and the same is dismissed. Rule discharged.

zgs/-